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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matter of)
)
CHAMELEON RADIO CORPORATION) MM Docket No. 96-173
)
Order To Show Cause Why the License)
of Station KFCC(AM), Bay City, Texas,)
Should Not Be Revoked)
)
Request for Extension of Special)
Temporary Authority)

To: The Hon. Joseph Chachkin

MASS MEDIA BUREAU'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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SUMMARY

Chameleon Radio Corporation ("Chameleon"), the licensee of Station KFCC(AM), Bay City, Texas, misrepresented facts and lacked candor to the Commission regarding the status of its licensed facility at Bay City when requesting special temporary authority on April 21, 1995. In addition, Chameleon lacked candor to the Commission regarding the construction of a tower at a site in Harris County, Texas, proposed in an amended request for special temporary authority filed on May 2, 1995. Accordingly, Chameleon's license for Station KFCC(AM), Bay City, Texas, should be revoked. In light of the fact that the Mass Media Bureau ("Bureau") has concluded that revocation of Chameleon's license is warranted, the Bureau does not recommend imposition of a forfeiture. Nevertheless, if it is determined that revocation of Chameleon's license is not warranted, the Bureau recommends that the maximum forfeiture of \$250,000 be imposed.

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I. Preliminary Statement

1. By *Order to Show Cause, Hearing Designation Order and Notice of Apparent Liability*, 11 FCC Rcd 11088 (1996) ("*Show Cause Order*"), the Commission ordered Chameleon Radio Corporation ("Chameleon") to show cause why its license for Station KFCC(AM), Bay City, Texas, should not be revoked upon the following issues:

- (a) To determine whether Chameleon Radio Corporation misrepresented or lacked candor to the Commission regarding the status of its licensed broadcast facility at Bay City, Texas, when requesting Special Temporary Authority on April 21, 1995.
- (b) To determine whether Chameleon Radio Corporation lacked candor to the Commission regarding the construction of a tower at the Harris County Site, when filing its amended request for Special Temporary Authority on May 2, 1995.
- (c) To determine, in light of the evidence adduced under the foregoing issues, whether Chameleon Radio Corporation possesses the requisite qualifications to be or remain licensee of KFCC(AM), Bay City, Texas.

2. The *Show Cause Order* placed the burden of proceeding with the introduction of evidence and the burden of proof with respect to the designated issues upon the Mass Media Bureau ("Bureau"). The *Show Cause Order* also directed that, if it is determined that revocation of the KFCC(AM) license is not warranted, the Presiding Judge shall determine, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 503, whether to issue an Order of Forfeiture against Chameleon in an amount up to \$250,000 for the willful and/or repeated violation of Section 73.1015 of the Commission's Rules, 47 C.F.R. § 73.1015.¹

¹ Section 73.1015 of the Commission's Rules provides, in pertinent part, that no applicant, permittee, licensee, or person who files any application, pleading, report or any other written statement to the Commission or in response to any Commission inquiry shall make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

3. A hearing in this proceeding was held in Washington, D.C., on February 24, 1997, after which the record in this proceeding was closed. *See Order*, FCC 97M-25, released February 27, 1997.

II. Proposed Findings of Fact

4. Michael Don Werlinger ("Werlinger") is the President of Chameleon, the licensee of KFCC(AM), Bay City, Texas. MMB Ex. 14, p. 1. At the time Chameleon acquired KFCC, Werlinger was also President of KENR Management Company, Inc. ("KMC"). Beginning on April 1, 1994, KMC provided programming produced by various international programmers to the licensee of station KENR(AM), Houston, Texas, pursuant to a time-brokerage agreement. However, in late November 1994, KENR(AM) was sold, and KMC became aware that it would likely lose its Houston broadcast outlet. MMB Ex. 13, p. 1. KMC's time-brokerage agreement was formally terminated by the new licensee of KENR(AM) on April 6, 1995. MMB Ex. 13, p. 3.

5. Faced with the imminent termination of the time-brokerage agreement, Werlinger continued negotiations with the new licensee of KENR(AM), while at the same time seeking another Houston outlet for the programming he was contractually obligated to deliver in that market. MMB Ex. 13, p. 2. With regard to finding another outlet to serve Houston, Werlinger focused on obtaining the license for KFCC (then KIOX(AM)²), which is licensed to serve Bay City, Texas, on 1270 kHz with a transmitter power of 1000 watts (DA-N), from a

² For ease of reference, the station will hereafter be referred to as KFCC.

site 5.8 km northeast of Bay City, Texas ("Bay City site"). MMB Ex. 13, p. 2; MMB Ex. 14, p. 1. Werlinger initially hoped to be able to maintain a programming agreement with KENR(AM) for a period of time sufficient for him to remove KFCC from the air and file an FCC Form 301 for Commission authorization to change the station's community of license to a community where service to Houston could be effectuated. MMB Ex. 5, pp. 3, 7-8; MMB Ex. 13, p. 2; Tr. 82-84, 121-122. However, when the agreement with KENR(AM) was terminated, Werlinger sought the subject special temporary authority ("STA") for KFCC to continue to meet KMC's contractual obligations to deliver programming to the Houston market pending a permanent relocation of KFCC. MMB Ex. 5, pp. 7-8. On February 16, 1995, an application (BAL-950216EA) to assign the license of KFCC, Bay City, Texas, from Landrum Enterprises, Inc. ("Landrum Enterprises") to Chameleon was filed. That application was granted by the Commission on April 18, 1995. Chameleon Ex. 1, App. 1.

6. Immediately following closing on April 20, 1995, Chameleon removed KFCC from the air. MMB Ex. 5, p. 8; Tr. 99. On April 21, 1995, Chameleon filed a request for STA to operate KFCC at variance from its licensed parameters. MMB Ex. 6. The STA request was signed by Werlinger. MMB Ex. 6, p. 1. Although the station had been taken silent the previous day, Chameleon stated (incorrectly) in the STA request that KFCC "currently operates from a licensed site near Bay City, Texas," at coordinates N 29-38-10, W 95-32-22. Chameleon further stated that it required the requested STA to operate from an alternate site "[d]ue to the loss of its currently licensed site." MMB Ex. 6, p. 3. Chameleon did not elaborate on the "loss" of the site at that time. MMB Ex. 6, p. 3. Tr. 98.

7. In the STA request, Chameleon proposed to operate from a site in "rural southwest Harris County" ("Harris County site") at coordinates N 29-38-10, W 95-32-22. The coordinates N 29-38-10, W 95-32-22 were the same coordinates as those inaccurately specified in the STA request for KFCC's authorized Bay City site. MMB Ex. 6, p. 3. The coordinates specified in the STA request as the licensed site for KFCC were in fact the coordinates for the Harris County site. Werlinger testified at hearing that this was a "typographical error." Tr. 86-87. While Chameleon stated in the STA request that it intended to make the proposed Harris County site its permanent transmitter location, the STA request did not disclose Chameleon's intention to effectuate a change of community of license from Bay City to any specific community closer to Houston, Texas. MMB Ex. 6, p. 4; Tr. 106-107. In this regard, Werlinger admitted at hearing that KFCC's STA proposal would not provide city-grade signal coverage to Bay City from the Harris County site, as required by Section 73.24(i) of the Commission's Rules, 47 C.F.R. § 73.24(i). Tr. 104. Chameleon's STA request neither disclosed that fact nor requested a waiver of that rule. MMB Ex. 6, pp. 3-4; Tr. 104.

8. Chameleon also proposed to construct a new 180 foot tower at the Harris County site, and it stated in the STA request that on April 20, 1995, it had sought FAA authority to construct. MMB Ex. 6, pp. 3-4. However, Chameleon's FAA notification, which included the coordinates for the Harris County site, was dated March 28, 1995.³ MMB Ex. 11, p. 1.

³ The March 28 date on the FAA notification also conflicts with Werlinger's statement that *after* KMC was notified on April 6, 1995 that the time-brokerage agreement with KENR(AM) was being terminated, Chameleon "moved with all haste toward finding an acceptable transmitter site in southwest Houston to which it could move" and that "a site was found in rural Harris County." MMB

9. Between April 21, 1995 and April 26, 1995, Werlinger had a telephone conversation with John Vu, a staff engineer in the Bureau's Audio Services Division ("Division"), regarding the proposed STA. Werlinger was informed by Vu that because the proposed STA involved the construction of a new tower, the Division would not grant the STA. MMB Ex. 5, p. 8; Tr. 162. Werlinger disagreed with Vu, and repeatedly tried to convince him that he was in error. Werlinger insisted that STA requests had been granted in the past where new tower construction was involved and that the STA should be granted as requested. MMB Ex. 5, p. 8-9; Tr. 163. According to Werlinger, "Mr. Vu remained adamant that no new construction could take place." MMB Ex. 5, p. 9; Tr. 163. Although Werlinger disagreed with Vu's explanation of the Commission policy on new tower construction for STAs, he clearly understood that Vu was telling him that an STA would not be granted for the Harris County site if construction of a new tower was required. Tr. 162-166; Tr. 189-190. Werlinger did not raise Vu's analysis with any other member of the Division's staff or with any other office within the Commission. Tr. 164. Instead, after failing to convince Vu that the requested STA should be granted, Werlinger decided to "work around" this policy and build a new tower at the Harris County site.⁴ Tr. 164, 166. If an STA could only be granted for an "existing" tower, then Werlinger was going to "[make] the tower exist." Tr. 172.

10. On April 26, 1995, after his conversation with Vu, Werlinger spoke with Joe

Ex. 5, p. 8.

⁴ Werlinger describes his efforts at obtaining the STA as a "creative use" of the rules and as going "to the outer limits" of the rules. MMB Ex. 5, pp. 16, 18.

McClish ("McClish") of Economy RF Construction Company, an Austin, Texas, communications tower construction company, and arranged to have a new 180 foot tower constructed at the Harris County site. McClish began the preparation work for the tower, which included pouring concrete foundations, on April 29, 1995. By May 1, 1995, McClish had constructed a Rohn model 25 tower at the Harris County site, at coordinates different than in the April 21 STA request. However, the ground system and folded unipole antenna were not installed on the tower at this time. In fact, no broadcast equipment was placed on the site until after grant of the STA. MMB Ex. 5, p. 9. Werlinger testified that it was his thinking at the time that since he could not construct a new "broadcast" tower under the Commission policy cited by Vu, he would build a new "nonbroadcast" tower and then convert it to a "broadcast" tower once the STA was granted. Tr. 179-180.

11. On May 2, 1995, Chameleon amended its STA request. MMB Ex. 18. As amended, Figure E:1 of the STA request depicts the originally proposed tower at coordinates N 29-38-10, W 95-32-22, plus an "existing" 180 foot tower at coordinates N 29-38-14, W 95-32-24, approximately 0.25 km from the tower proposed in the April 21 STA request. MMB Ex. 18, p. 2. With this amended STA request, Chameleon attempted to demonstrate compliance with the policy explained by Vu. Tr. 187. The amended STA request, however, did not disclose that the "existing" tower was in fact a newly constructed tower, nor did it disclose Werlinger's role in arranging for the construction of the "existing" tower. Tr. 181.

12. The amended STA request also failed to disclose that the April 21 STA request

contained incorrect coordinates for KFCC's authorized Bay City site. MMB Ex. 18; Tr. 96. Because the April 21 STA request contained incorrect coordinates for KFCC's authorized site, the "existing" tower referred to in the amended STA request appeared to be only 0.25 km from the licensee's authorized site. MMB Ex. 14, p. 2. Moreover, because the amended STA request contained two different sets of coordinates, one set for the originally proposed tower and one set for the "existing" tower, the amended STA request on its face appeared to propose the use of an existing tower which was located at different coordinates than those provided in the April 21 STA request, rather than a newly constructed tower. MMB Ex. 18; Tr. 96-97.

13. On May 5, 1995, the Division granted Chameleon STA to operate with 1,000 watts daytime and 100 watts nighttime from the "existing" tower at coordinates N 29-38-10, W 95-32-22 "due to loss of authorized site." MMB Ex. 8, p. 1. Although these coordinates were actually the coordinates for the originally proposed tower at the Harris County site, and not the coordinates specified in the amended STA request for the "existing" tower, Chameleon never notified the Division of this error. Tr. 96. The Division's letter also incorrectly noted that the STA site was 0.25 km from KFCC's licensed site in Bay City. MMB Ex. 8, p. 1. Again, Chameleon did nothing to correct this misunderstanding on the Division's part. Tr. 96, 157-59. By May 7, 1995, the ground system and folded unipole antenna had been installed on the tower, and on May 8, 1995, KFCC began operating from the Harris County site. MMB Ex. 5, p.11.

14. By letter dated May 12, 1995, the Division superseded the grant of the STA.

MMB Ex. 9. The May 12, 1995, letter corrected the coordinates for the Harris County site because, upon further review of the amended STA request, the Division noticed that the coordinates specified in the May 5, 1995, letter granting the STA were actually the coordinates for the originally proposed tower, not for the asserted "existing" tower. The May 12, 1995 letter also ordered KFCC to reduce its operating power to 300 watts daytime and 50 watts nighttime. MMB Ex. 9. The Division ordered the reduction in power because it had received complaints of interference from the licensee of KWHI, Brenham, Texas. MMB Ex. 5, p. 14. On May 18, 1995, the Division rescinded the STA, noting that further study had revealed that KFCC could not provide the required city-grade signal strength coverage to its community of license, Bay City, Texas, from the Harris County site, in contravention of Section 73.24(i) of the Commission's Rules. MMB Ex. 10. However, at Chameleon's request, the Division stayed the rescission of KFCC's STA on May 25, 1995, pending further clarification of the record. Chameleon Ex. 1, App. 7.

15. On July 25, 1995, the Division issued a Letter of Inquiry requesting certain information from Chameleon. Chameleon Ex. 1, App. 8. Among other things, Chameleon was asked to provide specific details concerning the circumstances under which Chameleon "lost" the Bay City site; Chameleon's present legal right of access to the Bay City site; and the nature and extent of any changes in the status of the KFCC transmission facility at the Bay City site. Chameleon was also requested to furnish a showing demonstrating that no better site -- other than the Harris County site -- existed from which KFCC could maintain coverage as closely as possible to its licensed service, including principal community contour

coverage of Bay City, Texas. Finally, Chameleon was asked to provide any information as to whether its principals, or its officers or directors, directly or indirectly, ordered construction of a tower on the Harris County site and if so, the date construction of the tower began and the identity of the tower construction contractor. Chameleon Ex. 1, App. 8, pp. 3-5.

16. On August 1, 1995, Chameleon filed a request for extension of the STA. Chameleon Ex. 1, App. 9. On August, 4, 1995, Chameleon submitted its response to the Division's Letter of Inquiry. In this response, Chameleon implied that it was McClish who had suggested building a tower on the Harris County site. Specifically, Chameleon reported that during the course of a conversation on April 26, 1995, "McClish asked [Werlinger] if he (McClish) would be prohibited from erecting a tower 180 feet in height and leasing the tower to Chameleon once and if the STA were permitted." Chameleon further reported that McClish "stated that if Chameleon would grant use of its land (which Chameleon held under a lease/purchase agreement) on a reasonably priced basis, his company would like to erect a tower and rent space to other tenants if Chameleon could not make use of the tower." MMB Ex. 5, p. 9. Chameleon also claimed that "all work [on the tower] was done at McClish's expense" and that "no funds were passed from Chameleon or any principal in Chameleon toward the construction of the tower." MMB Ex. 5, p. 9. Although Chameleon submitted copies of certain lease documents involving the Bay City site, Chameleon did not directly respond to the Division's inquiries concerning the circumstances surrounding Chameleon's "loss" of the Bay City site and Chameleon's present right of access to that site. In addition, Chameleon failed to furnish the requested showing demonstrating that no better site existed

from which KFCC could maintain coverage as closely as possible to its licensed service.⁵

MMB Ex. 5; MMB Ex. 14, pp. 4-5.

17. After reviewing the complete record, including Chameleon's response to the Letter of Inquiry, the Division issued a letter on September 8, 1995, denying Chameleon's request for extension of the STA, cancelling the STA, and directing KFCC to resume operations from its Bay City site or to file an appropriate request for silent authority. MMB Ex. 14. The Division explained that Chameleon's proffered basis for requesting the STA -- the "loss of its currently licensed site" -- was not supported by Chameleon's submissions. The Division noted that, according to lease documents submitted by Chameleon, Chameleon had assigned the rights of some unidentified portion of KFCC's authorized site in Bay City back to Landrum Enterprises, KFCC's previous owner, but that Chameleon failed to respond to a specific question regarding its legal rights to the site.⁶ Because Chameleon failed to support its assertion that the site had been "lost," the Division concluded that Chameleon had

⁵ Chameleon did not address whether it considered other sites for its proposed STA operation that might provide better service to Bay City. At hearing, Werlinger testified that Chameleon never intended to serve Bay City, but always intended to move the station in order to serve the Houston market. In fact, Chameleon intended to cease service altogether pending a community of license change. However, when its programming arrangement with KENR(AM) was terminated, Chameleon sought the STA for the purpose of expediting its service to the Houston market. A more appropriate site to serve Bay City pursuant to the STA was, therefore, not considered. Tr. 82-84, 121-122.

⁶ The Division's letter also stated that Chameleon did not respond to its query regarding the condition of KFCC's licensed facilities at Bay City, whether Chameleon was precluded from constructing at any other site by which it could maintain licensed service to Bay City, or whether KFCC was in compliance with the main studio requirements of Section 73.1125(a) of the Commission's Rules. MMB Ex. 14, pp. 4-5.

"voluntarily" abandoned the Bay City Site.⁷ MMB Ex. 14, p. 5. The Division further concluded that Chameleon's use of STA to introduce a new broadcast service to Houston was a violation of both its STA policy, which requires that the site "loss" be beyond the applicant's control, and the licensing procedures of Section 309 of the Communications Act of 1934, as amended ("Act").⁸ MMB Ex. 14, pp. 5-6.

18. The Division also found that Chameleon's construction at the Harris County site contravened the Bureau's policy not to authorize construction of new facilities intended for permanent use pursuant to STA. The Division concluded that after Chameleon learned that its April 21 STA request would not be granted for this reason, Chameleon arranged for a new tower to be constructed on the Harris County site by May 1, 1995, and then amended the STA on May 2, 1995, to propose operation from an "existing" tower at that site. Because it appeared that Chameleon arranged for the construction of this tower for the primary purpose of providing service under the STA, with the intention of the tower becoming a permanent structure for new facilities, the Division concluded that extending the STA would clearly violate its established STA policy. MMB Ex. 14, p. 6.

⁷ The Division believed that Chameleon's abandonment of KFCC's authorized site at Bay City was motivated by KMC's need, once it lost its time-brokerage agreement with KENR(AM), for a Houston outlet to fulfill its contractual obligations to suppliers whose programs had been carried on KENR(AM). MMB Ex. 14, p. 5. The Division reasoned that, since Chameleon's admitted "need" for an acceptable Houston broadcast signal motivated the STA request rather than a site "loss" beyond Chameleon's control, extension of the STA was not warranted. MMB Ex. 14, p. 5.

⁸ 47 U.S.C. § 309. Specifically, Section 309 of the Act requires that new facilities, such as those proposed by Chameleon in its STA request, may only be authorized after public notice and a thirty-day period in which interested parties may file petitions to deny.

19. By letter dated September 22, 1995, Chameleon requested reconsideration of the Division's September 8, 1995, letter cancelling its STA. MMB Ex. 15. Chameleon argued that the Division had ignored the "extraordinary circumstances" present when Chameleon's affiliated entity, KMC, was facing the cessation of its business by the cancellation of its time-brokerage agreement in Houston. MMB Ex. 15, p. 1. Chameleon also argued that the Division had in the past permitted STA operations similar to that undertaken by Chameleon. MMB Ex. 15, p. 2.

20. In another letter dated September 29, 1995, Chameleon for the first time specifically addressed the "loss" of the Bay City site. Chameleon explained that it was never the intention of Chameleon to occupy the Bay City site because Landrum Enterprises, the prior owner of KFCC, operates an FM station from that site. Chameleon asserted that its "loss" of the Bay City site was a result of the site "being retained by the previous owner [Landrum Enterprises] as a condition of the purchase of KFCC" Chameleon stated that this arrangement was formalized through a lease back agreement signed simultaneously with closing on April 20, 1995, and emphasized that the lease back occurred "as a condition of sale." MMB Ex. 16, p. 1 (emphasis in original).

21. After Chameleon's request for reconsideration was denied, Chameleon filed a motion to stay the cancellation of the STA in the U.S. Court of Appeals for the D.C. Circuit on October 6, 1995. Chameleon Ex. 1, p. 4. However, before the court ruled on this motion, the then-Acting Chief of the Division, by letter dated October 11, 1995, stayed cancellation of

the STA and reinstated the STA extension request pending full Commission review.

Chameleon Ex. 1, App. 16.

22. During this period, Chameleon continued to operate KFCC without interruption from the Harris County site. Chameleon Ex. 1, p.19. On November 2, 1995, Chameleon filed a Petition for Review of this matter by the full Commission. Chameleon Ex. 1, p. 4. In a statement made under penalty of perjury which was appended to the Petition for Review, Werlinger further elaborated on Chameleon's claimed site "loss," stating that Landrum Enterprises wished to retain the use of the Bay City site for its own FM station operation and that Chameleon had agreed to lease back the Bay City site to Landrum Enterprises for such use. That, Werlinger stated, was why Chameleon did not have use of the Bay City site and why the site loss was "involuntary." MMB Ex. 7, p. 1. However, after Chameleon's Emergency Motion to Stay, submitted to the U.S. Court of Appeals for the D.C. Circuit, was denied on September 4, 1996, Chameleon terminated KFCC's operations from the Harris County site on September 5, 1996, and resumed KFCC's operations from its authorized transmitter site at Bay City on September 7, 1996, from where it continues to operate. Chameleon Ex. 1, p. 22.

23. In his direct written and oral testimony, Werlinger further elaborated on the "loss" of KFCC's authorized site at Bay City and on the construction of the "existing" tower at the Harris County site. Werlinger explained in his direct written testimony that his prior use of the word "involuntary" in reference to the "loss" of the Bay City site "intended no

misconception that anything more was involved than the legal obligation under the contract which had been consummated and acted upon by all parties," *i.e.*, that the site was no longer available to him by operation of the lease back agreement with Landrum Enterprises.

Chameleon Ex. 1, p. 8. At hearing, Werlinger again testified that he was obligated to vacate the Bay City site by virtue of the lease back agreement.⁹ Tr. 114. Werlinger eventually admitted, however, that he had entered into the lease back agreement voluntarily and that Landrum Enterprises never asked or required him to vacate the Bay City site, or enter into the leaseback agreement, as a condition of the sale of KFCC. Werlinger also stated that there is nothing in Chameleon's agreement with Landrum Enterprises that would prevent Chameleon from utilizing the Bay City site. Tr. 117-118; Tr. 127-130. These admissions are consistent with testimony supplied by Jake Landrum, President of Landrum Enterprises, in which Landrum states that the lease back agreement never prevented Chameleon from operating KFCC at the Bay City site and that Landrum never told Chameleon to leave or not use the Bay City site. MMB Ex. 20, pp. 1-3.¹⁰ Werlinger also admitted at hearing that the reason no specific provision was made in the lease back agreement for Chameleon to have access to KFCC's licensed site in Bay City was that Chameleon never intended to operate KFCC from that site. Tr. 82-84, 121-22. In fact, at hearing, Werlinger confirmed that it was his voluntary decision not to use the authorized Bay City site, and he ultimately admitted that

⁹ Werlinger testified at hearing that the closing on KFCC and the lease back agreement occurred simultaneously on April 20, 1995, obligating him to vacate the Bay City site immediately. Tr. 114, 117. However, the term of the lease back agreement did not actually commence until May 1, 1995, ten days *after* Chameleon filed an STA claiming that its Bay City site had been "lost." MMB Ex. 4, p. 2.

¹⁰ Landrum's declaration was marked for identification at hearing as Mass Media Bureau Exhibit 21, but was received as Mass Media Bureau Exhibit 20. Tr. 40-41.

Chameleon voluntarily abandoned the Bay City site. Tr. 128-29.

24. With respect to the "existing" tower at the Harris County site, Werlinger stated in his direct written testimony that Chameleon was "instrumental" in making arrangements with McClish for the construction of a 180 foot tower at the Harris County site. In addition, Werlinger stated that Chameleon did not provide the funds to McClish for the construction of the tower, but that McClish was indebted to Werlinger from a previous transaction and funded the tower construction in the approximate amount of \$5,000 in reducing that indebtedness. Chameleon Ex. 1, p. 11. Werlinger admitted at hearing that he called McClish and asked McClish to construct the tower at the Harris County site after being informed by Vu that an STA could not be granted if new construction was involved. Tr. 170. None of this was disclosed in the May 2, 1995, amendment to the STA request. MMB Ex. 18. Werlinger also disclosed for the first time at hearing that Chameleon paid for the construction of the tower and later formally purchased the tower from McClish after KFCC had been operating from the Harris County site for several months. Tr. 168-170.

25. At hearing, Werlinger initially sought to excuse his failure to disclose his role in arranging for the construction of the tower by suggesting that Vu should have known that he was not exactly being candid about the tower and that Vu should have asked questions about the tower. Tr. 182-183. In Werlinger's view, he had no duty other than to represent that "there was a tower there." Tr. 184. Werlinger subsequently conceded that Vu had a right to rely on the representations made in the amended STA request and that he should have fully

disclosed to the Commission the circumstances surrounding the construction of the tower at the Harris County site. Tr. 183-185.

26. Finally, throughout this proceeding and at hearing, Werlinger attempted to justify his actions regarding the requested STA for KFCC by claiming that he was simply relying on his past experience in filing STA requests with the Commission. Werlinger testified that he was not familiar with the requirements of Section 73.1635 of the Commission's Rules insofar as they require applicants to fully describe the proposed operation and the necessity for the requested STA. Tr. 187-88, 210. Instead, Werlinger claimed that he relied on his past experiences, and particularly an STA request he filed in 1993 as a technical consultant on behalf of the licensee of Station KVCJ(AM), formerly licensed to Mineola, Texas. Chameleon Ex. 1, pp. 7-8, 11-12, 17-18; Tr. 131-133, 207. According to Werlinger, he filed, and the FCC granted, an STA request to operate KVCJ(AM) from a site in Canton, Texas, without any reference to a loss of the transmitter site in Mineola. Chameleon Ex. 1, p. 7. Moreover, Werlinger stated that it was his experience with the KVCJ(AM) STA request that an "existing" tower was not necessary to obtain STA. Chameleon Ex. 1, p. 12.

27. Although the STA request for KVCJ(AM) contained no reference to a lost transmitter site, the Division's grant of the KVCJ(AM) STA request filed by Werlinger and subsequent extensions of that STA were explicitly premised on the understanding that

KVCI(AM)'s authorized transmitter site had been lost.¹¹ Chameleon Ex. 1, App. 21, pp. 1, 26; MMB Ex. 22, p. 2. Werlinger indicated in his direct written testimony and at hearing that he was not aware that loss of authorized transmitter site is necessary to obtain STA. Chameleon Ex. 1, p. 7; Tr. 99. However, Werlinger clearly was on notice that the KVCI(AM) STA request had been granted because the Division staff believed that KVCI(AM)'s authorized transmitter site had been lost, and Werlinger did include in KFCC's STA request a statement that KFCC's transmitter site had been lost. Chameleon Ex. 1, App. 21, p. 26; MMB Ex. 6, p. 3.

28. Moreover, even assuming that Werlinger was correct in stating that an existing tower was not necessary to obtain STA based on his experience with KVCI(AM), Vu expressly told Werlinger that Commission policy precluded grant of STA for KFCC if new tower construction was required. MMB Ex. 5, p. 8; Tr. 163. Even when Werlinger pointed out that an existing tower was not required to obtain STA for KVCI(AM), Vu remained adamant that no new construction could take place. MMB Ex. 5, pp. 8-9; Tr. 163. Rather than question Vu's position as to the policy with any other member of the Division's staff, Chameleon attempted to demonstrate compliance with the policy by having a new tower constructed on the Harris County site and, without disclosing its "instrumental" role in that

¹¹ The staff grant of the STA requested for KVCI(AM) mistakenly stated that the grant was "due to loss of authorized site." Chameleon Ex. 1, App. 21, p. 26. Although he prepared and filed the STA request on behalf of the KVCI(AM) licensee, Werlinger maintained at hearing that despite the fact that he knew the Commission grant was in error and did not reflect what he asked for, he was under no obligation to correct the Commission's error because he was not the licensee of and no longer a consultant to the station. Tr. 137, 150-151. Nevertheless, the KVCI(AM) STA was subsequently terminated in part because the staff determined that the licensee had not, for reasons beyond its control, lost its authorized site. MMB Ex. 23, p. 1.

construction, amending its STA request to specify an "existing" tower where one did not exist when the April 21 STA request was filed. Tr. 164-166.

29. As to the overall responsibility of an STA applicant, Werlinger acknowledged that the Commission should be able to rely on the representations of applicants. Werlinger also admitted that he was not entirely forthcoming with the Division staff in this case and only told them enough facts he believed were necessary to obtain the STA. Tr. 183-85, 207. He further testified that had the Division raised any particular question on the STA request, he would have answered any question put to him. Tr. 184. For example, when Werlinger was asked whether he had any obligation to disclose what was later learned to be his "instrumental" role in constructing a new tower on the Harris County site, he replied that that would be "putting an onus on me that would not have been there in any other case." Tr. 184. However, Werlinger later admitted that not only did he fail to fully explain the circumstances underlying the STA request when filed and/or amended, but that he would have been better served if he had done so. Chameleon Ex. 1, p.11; Tr. 185, 207.

III. Conclusions Of Law

1. Under Section 312(a) of the Communications Act of 1934, as amended, the Commission may revoke any station license for, among other things, false statements knowingly made either in an application or in any statement of fact which may be required under Section 308 of the Act or because of conditions coming to the attention of the

Commission which would warrant it in refusing to grant a license or permit on an original application. *See* 47 U.S.C. § 312(a). Misrepresentation involves false statements of fact made with an intent to deceive the Commission. Lack of candor involves concealment, evasion and other failures to be fully forthcoming or informative, accompanied by an intent to deceive the Commission. Both represent deceit, differing only in form. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). Intent may be found from the false statement of fact coupled with proof that the party making it had knowledge of its falsity. *See David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991). Intent may also be found from motive. *See Joseph Bahr*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994). A licensee's indifference and wanton disregard for the accuracy of its representations and its obligations to the Commission is equivalent to an affirmative and deliberate intent. *RKO General, Inc. v. FCC*, 670 F. 2d 215, 225 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 and 457 U.S. 1119 (1982).

2. Absolute candor is perhaps the foremost prerequisite for Commission licenseeship. *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126 (Rev. Bd. 1987), *aff'd in pertinent part*, 4 FCC Rcd 2553 (1989), *recon. denied*, 4 FCC Rcd 6312 (1989); *Mid Ohio Communications*, 104 FCC 2d 572 (Rev. Bd. 1986), *rev. denied*, 5 FCC Rcd 940, *recon. dismissed in part, denied in part*, 5 FCC Rcd 4596 (1990). The duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *RKO General, Inc. v. FCC*, *supra* at 229. In order for the Commission to

maintain the integrity of its processes, it must routinely rely upon the representations of its licensees. Given the Commission's limited resources, its system of regulatory control must, of necessity, presuppose the honor of its regulatees. *Tri-State Broadcasting Co., Inc.* 5 FCC Rcd 1156, 1173 (Rev. Bd. 1990), *recon. denied*, 5 FCC Rcd 3727 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 2604 (1991). Indeed, the "trait of truthfulness" and the "future reliability" of a licensee are the two key elements of the character necessary to operate a broadcast station in the public interest. See *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1209-10 (1986). In this regard, the Commission is concerned with "whether the licensee will in the future be likely to be forthright with the Commission and to operate its station consistent with the requirements of the Communications Act and the Commission's Rules and policies." *Id.*

3. The integrity of broadcast licensees is crucial in regard to the issuance of STAs, which by their very nature involve temporary or emergency situations requiring prompt action on the Commission's part to minimize disruptions in existing service. In the case at hand, the Commission granted Chameleon STA to operate KFCC from the Harris County site in reliance on Chameleon's representations that its licensed site at Bay City had been lost, that it had secured an existing tower for the proposed STA operation, and that the STA was necessary to restore existing service. However, the record evidence clearly establishes that Chameleon misrepresented facts and lacked candor to the Commission when requesting the STA on April 21, 1995, and lacked candor in the May 2, 1995, amendment to that STA request.

A. Lost Site Issue

4. Under Issue (a), the Bureau was required to show that Chameleon misrepresented or lacked candor to the Commission regarding the status of its licensed broadcast facility at Bay City when it requested STA on April 21, 1995. In that STA request, Chameleon represented that such authority was necessary to operate KFCC from an alternate site "[d]ue to the loss of its currently licensed site." The findings demonstrate that this claim was false. In this regard, Chameleon first failed to respond to a Letter of Inquiry asking it specific questions regarding the status of KFCC's authorized Bay City site. Later, *after* the STA had been cancelled, Chameleon first addressed the "loss" of the Bay City site by claiming that the site was lost as a result of a contractual agreement entered into as a condition of the purchase of KFCC. This loss later was termed "involuntary." Still later, it was revealed that the site loss was not lost, but rather abandoned by Chameleon. Specifically, Chameleon explained in response to a Commission inquiry that it had "lost" the Bay City site by virtue of a lease back agreement with Landrum Enterprises, from whom it acquired the KFCC license. However, this lease back agreement does not, by its terms, expressly preclude Chameleon from operating KFCC from the Bay City site. In fact, as Werlinger later admitted at hearing, no specific provision was made in the lease back agreement for Chameleon to have access to KFCC's licensed site in Bay City *because Chameleon never had any intention of operating KFCC from that site.* In any event, Chameleon was neither required nor asked to vacate the Bay City site, but rather voluntarily abandoned the site for the purpose of meeting its contractual obligations to deliver programming to the Houston market. Thus, contrary to the

claim in the April 21, 1995, STA request, Chameleon *never* lost the use of its currently licensed site. Chameleon's statements and conduct with respect to its claim that the grant of an STA was warranted due to its "loss" of the licensed site were wholly unreasonable and had no basis in fact.

5. In any event, Chameleon knew a loss of site was necessary to obtain STA, and its claim that its site had been lost was therefore made with the intent to deceive. Although Chameleon claimed that it was not aware that a loss of site was necessary to obtain STA to operate KFCC from an alternate site, citing Werlinger's prior experience in filing an STA request for KVCJ(AM), the evidence demonstrates otherwise. In this regard, while it is true that the STA request for KVCJ(AM) contained no reference to a lost site, the staff expressly premised its grant of the KVCJ(AM) STA request on the understanding that KVCJ(AM)'s authorized transmitter site had been lost.¹² Chameleon abandoned KFCC's authorized transmitter site in order to claim that that site was "lost" and create the factual premise to commence service to the Houston market. Clearly, Chameleon's "need" for an acceptable Houston broadcast signal, rather than any loss of site beyond the licensee's control, was the basis for Chameleon's STA request.¹³

¹² The circumstances surrounding the grant of the KVCJ(AM) STA reveal that the two cases are dissimilar on key points relating to the site loss (claimed for KFCC, not claimed for KVCJ(AM)) and adequacy of signal coverage (not specifically addressed for KFCC, waiver sought for KVCJ(AM)). Thus, Werlinger's reliance on that case to justify his actions with regard to the KFCC STA is misplaced.

¹³ In this regard, because Chameleon never intended to serve Bay City, it did not respond to the Division's inquiry regarding the search for other transmitter sites that would more closely resemble KFCC's currently authorized signal coverage.